

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PRIVACY INTERNATIONAL, et al.

Plaintiffs,

v.

18-CV-1488

FEDERAL BUREAU OF INVESTIGATION, et al.

Defendants.

DECLARATION

MICHAEL S. CERRONE, ESQ., makes this declaration under penalties of perjury, pursuant to 28 U.S.C. Section 1746:

1. I am an attorney duly licensed to practice in the State of New York and before this Court, and am an Assistant United States Attorney in the Western District of New York.

2. I am one of the attorneys representing defendants in this action commenced under the Freedom of Information Act ("FOIA").

3. This FOIA action was commenced on December 21, 2018. Dkt. # 1.

4. Plaintiffs filed an amended complaint on January 18, 2019. Dkt. # 5.

5. Issue was joined on March 4, 2019. Dkt. # 11.

6. On March 14, 2019, Magistrate Judge Hugh B. Scott entered a text order requiring the parties to meet and confer regarding a proposed joint discovery plan and schedule, and to submit said plan to the Court by April 19, 2019. Dkt. # 13.

7. In this action, plaintiffs are Privacy International, the American Civil Liberties Union, the American Civil Liberties Union Foundation, and the Civil Liberties and Transparency Clinic at the University at Buffalo School of Law. Dkt. # 5, p. 1.

8. Lead counsel for plaintiffs is Jonathan Manes, an Assistant Clinical Professor at the University at Buffalo School of Law, and the Director of the Civil Liberties and Transparency Clinic. Dkt. # 5, p. 31.

9. Because the Civil Liberties and Transparency Clinic is leading this litigation, law students, under Mr. Manes' direction and supervision, have been participating in conferences and communications among counsel.

10. Plaintiffs have sued 11 different federal agencies in this FOIA suit: the Federal Bureau of Investigation ("FBI"), the Drug Enforcement Administration ("DEA"), the Department of Justice Criminal Division, Immigration and Customs Enforcement ("ICE"), Customs and Border Protection ("CBP"), Internal Revenue Service ("IRS"), the United States Secret Service, Department of Justice-Office of Inspector General ("DOJ-OIG"), Department of Homeland Security-Office of Inspector General ("DHS-OIG"), Department of Treasury-Office of Inspector General ("Treasury-OIG"), and the Treasury Inspector General for Tax Administration ("TIGTA"). Dkt. # 5, p. 1.

11. Before filing suit, plaintiffs submitted a FOIA request to each of the seven defendant law enforcement agencies and another FOIA request to the four offices of Inspector General. Dkt. # 5, ¶ 56.

12. Copies of these FOIA requests are attached to plaintiffs' amended complaint. Dkt. # 5, Exhs. A and B.

13. Since issue was joined, counsel for all parties have been involved in extensive discussions and negotiations, through email, letter, and telephone conferences, in an effort to clarify and/or narrow the FOIA requests.

14. For example, defendants' counsel sent a lengthy letter to that effect on March 28, 2019.

15. Plaintiffs' counsel sent a response on April 8, 2019, and counsel then had a telephone conference on April 15, 2019 to further discuss defendants' letter.

16. Plaintiffs' counsel indicated in the April 15, 2019 telephone conference that they required additional time to provide a more fulsome response to defendants' counsel's March 28, 2019 letter.

17. Accordingly, on April 16, 2019, the parties jointly moved to extend the time to file a proposed discovery plan and schedule. Dkt. # 14.

18. That joint motion was granted by the Court which then extended the deadline to file the proposed discovery plan and schedule to May 17, 2019. Dkt. # 15.

19. The parties, on May 17, 2019 and June 14, 2019, moved jointly twice more to extend the time to file their discovery plan. Dkt. # 16 and 17.

20. Plaintiffs' counsel responded to defendants' counsel's March 28, 2019 letter on May 21, 2019.

21. By text order dated June 14, 2019, the Court granted both motions and set the deadline to file a discovery plan as July 31, 2019. Dkt. # 18.

22. Defendants' counsel sent a reply letter to plaintiffs' counsel on July 12, 2019.

23. The letter explained that three agencies – TIGTA, DHS-OIG, and Treasury-OIG – have conducted searches for records described in plaintiffs' request and found no documents.

24. The letter also explained that the other defendants would conduct searches based on the interpretations and parameters set forth in the letter.

25. As of July 30, 2019, plaintiffs' counsel had not responded to defendants' counsel's reply letter.

26. In the meantime, defendants (except for the three agencies that had already completed their searches) are moving forward with their search for responsive records based on the interpretation and parameters of the FOIA requests set forth in their July 12, 2019 letter.

27. At this time, those defendants are unable to provide an estimate of the date by which they will be able to complete their searches or production.

28. On July 31, 2019, we sent a draft of this motion to plaintiffs' counsel for review in an effort to obtain consent to the relief requested herein.

29. In a responsive email, plaintiffs' counsel suggested, among other things, that the parties submit a proposed scheduling order and status report or, alternatively, a statement of respective positions, seven days before the proposed September conference with the Court.

30. We do not think it will be feasible to submit a proposed scheduling order by a September conference date due to the extremely broad FOIA requests that plaintiffs have made here which has and will continue to require defendants to conduct extensive agency-wide searches for possible responsive material before they will even be able to provide an estimate of a future document review and production time frame.

31. However, defendants do not object to plaintiffs' suggestion that the parties provide a position statement prior to the proposed September conference in order to facilitate discussion with the Court.

32. After a second review of a draft of this motion, plaintiffs' counsel, Mr. Manes, advised in an email that "Plaintiffs consent to Defendants' request for a status conference in

September and to adjourn the current July 31, 2019 deadline to submit a scheduling order. Plaintiffs do not consent to the relief sought by Defendants to the extent that Defendants ask the Court to adjourn the deadline for a scheduling order indefinitely, without date.”

33. For the foregoing reasons, defendants respectfully request that (i) the July 31, 2019 deadline to submit a proposed scheduling order be adjourned without date and (ii) the Court set a status conference in September to discuss the progress of this matter further.

DATED: Buffalo, New York, July 31, 2019

/s/MICHAEL S. CERRONE
Assistant U.S. Attorney